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No. 01-758

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNITED PARCEL SERVICE, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an impairment that limits an individual's ability to perform one particular job can constitute a "disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2)(A), even if there has been no finding that the plaintiff has been excluded from a class of jobs or a sufficiently broad range of jobs to establish a substantial limitation on the "major life activity" of "working."

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all of the parties to the proceeding in the court below. Pursuant to Rule 29.6 of the Rules of this Court, petitioner United Parcel Service, Inc., an Ohio corporation, states that all of its stock is beneficially owned by United Parcel Service, Inc., a Delaware corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

- I. Factual Background 3
- II. Proceedings In The District Court 4
- III. Proceedings In The Court Of Appeals 5

REASONS FOR GRANTING THE WRIT 6

- I. The Ruling Below Conflicts With The Plain Language Of The Precedents, And The Decisions Of Eleven Other Circuits 6
- II. This Court Has Already Granted Certiorari To Address The Important Question Presented 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 7

Brunko v. Mercy Hosp., 260 F.3d 939 (8th Cir. 2001) 10

Contreras v. Suncast Corp., 237 F.3d 756 (7th Cir. 2001), *cert. denied*, 69 U.S.L.W. 3792 (U.S. Oct. 1, 2001) 10

Duncan v. Washington Metro. Area Transit Auth., 240 F.3d 1110 (D.C. Cir. 2001), *cert. denied*, 69 U.S.L.W. 3763 (U.S. Oct. 1, 2001) 11

Gelbart-Ladenheim v. American Airlines, Inc., 252 F.3d 54 (1st Cir. 2001) 9

Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047 (5th Cir. 1998) 10

Hilburn v. Murata Elecs. N. Am., Inc., 181 F.3d 1220 (11th Cir. 1999) 11

Hooven-Lewis v. Caldera, 249 F.3d 259 (4th Cir. 2001) 10

Muller v. Costello, 187 F.3d 298 (2d Cir. 1999) 9

Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999) 7, 9

Selenke v. Medical Imaging of Colorado, 248 F.3d 1249 (10th Cir. 2001) 10

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 7, 8, 13

Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789 (9th Cir. 2001) 10

Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3d Cir. 2001) 9

Williams v. Toyota Motor Mfg., Kentucky, Inc., 224 F.3d 840 (6th Cir. 2000) 11, 12

Statutes and Regulations

28 U.S.C. § 1254(1) 2

42 U.S.C. § 12101 *et seq.* 12

42 U.S.C. § 12102(2)(A) ..... *passim*

42 U.S.C. § 12117(a) 4

29 C.F.R. § 1630.2(i) 2, 6

29 C.F.R. § 1630.2(j)(1) 2, 7

29 C.F.R. § 1630.2(j)(3) 3

29 C.F.R. § 1630.2(j)(3)(i) 7, 8

Rule

Sup. Ct. R. 29 ii

PETITION FOR WRIT OF CERTIORARI

Petitioner United Parcel Service, Inc. ("UPS") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Review is warranted because the decision below, which holds that an employee is "disabled" under the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12102(2)(A), based solely on an inability to perform one specific job, exacerbates the existing confusion over the question on which this Court granted certiorari in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, No. 00-1089, ac ase that also originated in the Sixth Circuit. That question, critical to this case, is whether an impairment that precludes an individual from performing only a limited number of tasks associated with a specific job, but does not exclude the employee from a class or broad range of jobs, qualifies as a "disability" under the ADA. Because the resolution of *Toyota* will govern the liability determination in this case, this petition should be held pending the resolution of *Toyota* and then disposed of in light of the disposition of that case. Alternatively, the Court may wish to grant certiorari in this case to give plenary review to the question presented in this petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-12a) is reported at 249 F.3d 557. The opinion of the United States District Court for the Southern District of Ohio granting UPS's motion for

summary judgment (App., *infra*, 13a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2001. Petitioner filed a timely petition for rehearing and for rehearing *en banc*, which was denied on July 31, 2001. App., *infra*, 24a-25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3(2)(A) of the ADA, 42 U.S.C. § 12102(2)(A), provides, in pertinent part: "The term 'disability' means, with respect to an individual . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Section 1630.2(i) of Title 29 of the Code of Federal Regulations provides: "*Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

Section 1630.2(j)(1) of Title 29 of the Code of Federal Regulations provides:

> The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform ap articular major life activity as compared to the condition, manner, or duration under which the average person in the general

population can perform that same major life activity.

Section 1630.2(j)(3) of Title 29 of the Code of Federal Regulations provides, in pertinent part:

> With respect to the major life activity of *working* –
>
> (i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

STATEMENT OF THE CASE

I. Factual Background[1]

William Woods began his employment with UPS in 1984 as a driver in Austin, Texas for the UPS Central Texas District. In 1988, Woods began developing serious allergies that worsened over time. According to his doctors, Woods was allergic to the pollen of a plant found in central Texas. App., *infra*, 2a, 4a-5a.

In March 1994, Woods wrote a letter to William Smith, the UPS Central Texas District Manager, stating that he suffered from severe

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[1] Because this petition arises from a reversal of an order granting summary judgment, UPS draws its discussion of the facts entirely from the opinion of the court of appeals, which in turn assumed the validity of the allegations in the Complaint. UPS certainly disputes many of the contentions in the Complaint, although that dispute is not germane to this petition. Moreover, this petition recites only those facts relevant to the question presented.

allergies specific to central Texas and that he wanted to transfer out of the region in order to alleviate his symptoms. Specifically, Woods sought a transfer to the Kentucky area, where he had previously lived. The letter was accompanied by letters from Woods's doctors encouraging UPS to consider the request for a transfer. App., *infra*, 5a.

In April 1994, Rick Montecinos, the UPS human resources manager in Texas, informed Woods that a transfer would not be possible under company policy. Montecinos nevertheless arranged for Woods and his wife to meet with Alexa Johnson, the UPS human resources manager in Cincinnati, to discuss the possibility of his obtaining a position there. Johnson also advised Woods that he could not be transferred to Ohio, and she allegedly suggested that he might seek to re-apply for a position in Ohio after moving there, but she declined to accept an application from him at that time. App., *infra*, 5a-6a.

In October 1994, Woods resigned from UPS in Texas and moved his family to Kentucky. He submitted an application to UPS in Cincinnati, along with letters of recommendation from Montecinos and Joel Davis, Woods's manager in Texas. In November or December 1994, UPS informed Woods that he would not be hired, due to company policy not to rehire former employees. App., *infra*, 6a.

II. Proceedings In The District Court

In April 1995, Woods filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"), which in turn filed this lawsuit on his behalf under the enforcement authority conferred by 42 U.S.C. § 12117(a). The EEOC's Complaint alleges that UPS failed to provide a

reasonable accommodation of Woods's purported disability by refusing to allow his relocation to a different geographic area. App., *infra*, 2a-3a.

UPS moved for summary judgment on several grounds. One argument by UPS – the issue relevant to this petition – was that the EEOC could not establish its prima facie case because Woods was not disabled. The district court entered summary judgment in favor of UPS, holding, *inter alia*, that Woods could not establish that he was disabled or regarded as disabled. App., *infra*, 3a-4a.

III.Proceedings In The Court Of Appeals

On appeal, the court of appeals reversed the district court's entry of summary judgment, concluding that the district court had erred in every aspect of its holding. In the portion of the court of appeals' opinion relevant to this petition, the court addressed whether Woods's condition constituted a "disability" under the ADA. The court began by summarizing the EEOC's position:

> The EEOC insists that Woods was disabled while in Texas because his allergies were so severe as to impair his ability to breathe and to care for himself. There is testimony in the record which indicates that Woods's reactions to the allergen were steadily worsening, and that by the time he requested the transfer he rarely left home and spent nearly all of his non-working hours in bed. His wife assumed responsibility for his correspondence and household duties, while he suffered with severe nasal and bronchial congestion, swollen eyes and nose, rashes and fever blisters over large areas of his body, fatigue, fever, and depression.

App., *infra*, 9a. Next, the court addressed UPS's response: "UPS counters that Woods cannot be viewed as disabled because he was able to work his regular hours without accommodation while in Texas, and because he was admittedly no longer disabled once he moved to northern Kentucky." App., *infra*, 9a.

The court then stated its holding:

> [O]n the basis of the evidence noted above, Woods's letter to Smith noting his severe allergies specific to Central Texas and requesting a transfer, and his physician's letter stating that effective allergy medication would threaten Woods's safe operation of his truck, we conclude that a reasonable jury could find that Woods was properly "disabled" under the statute *due to the substantial limitations his allergy placed on his ability to perform his job* while in Texas, the place where he sought the accommodation of a relocation.

App., *infra*, 9a-10a (emphasis added).

UPS filed a timely petition for rehearing and for rehearing *en banc*, which was denied on July 31, 2001. App., *infra*, 24a-25a.

REASONS FOR GRANTING THE WRIT

I. The Ruling Below Conflicts With The Plain Language Of The Regulations Implementing The ADA, This Court's Precedents, And The Decisions Of Eleven Other Circuits

Under the ADA, an employee has a covered "disability" if he or she has an impairment that "substantially limits" one or more "major life activities." 42 U.S.C. § 12102(2)(A). "Working" is included among the "major life activities" encompassed by the ADA. 29 C.F.R. § 1630.2(i).

An employee is "substantially limit[ed]" where he or she is either "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which" the employee "can perform a major life activity" as compared to the "average person in the general population." 29 C.F.R. § 1630.2(j)(1). With regard to working, an employee is substantially limited when "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." *Id.* An issue of critical importance to employers and employees alike, therefore, is under what circumstances an impairment will be considered a substantial limitation on the major life activity of working. That threshold inquiry determines whether an employee is covered by the ADA.

Three Terms ago this Court grappled with this statutory and regulatory framework in a trilogy of cases. *See Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (holding, *inter alia*, that disability must be assessed on case-by-case basis in light of effects on specific employee); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) (holding, *inter alia*, that determination of whether employee has disability must address mitigating measures taken by the employee); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (holding, *inter alia*, that exclusion from position as commercial airline pilot does not constitute substantial limitation on major life activity of working). Since then, the lower courts have taken divergent positions re-

garding when an employee is substantially limited with respect to working. A variety of approaches have emerged, including some that are quite at odds with the plain language of the ADA and its regulations.

The court of appeals here determined that the record supported a finding that Woods is disabled, based solely on its conclusion that Woods had difficulty with *one particular* job. The record is devoid of any indication, however, that Woods's allergies excluded him from a class or a broad range of jobs. The court held that a finding of disability under the ADA could be made "due to the substantial limitations his allergy placed on his ability to perform *his job* while in Texas." App., *infra*, 9a-10a (emphasis added).

The court's decision is squarely at odds with the ADA regulations and the case law of this Court and other courts of appeals. The regulations plainly state that a claim of disability based on limitations on one's ability to work requires that a plaintiff be "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29C.F.R. § 1630.2(j)(3)(i). "The inability to perform *a single, particular job* does not constitute a substantial limitation in the major life activity of working." *Id.* (emphasis added).

This Court has already noted the "conceptual difficulty in defining 'major life activities' to include work," given the necessarily circular nature of the inquiry: an employee's exclusion from a job itself constitutes the disability that makes the exclusion unlawful. *Sutton*, 527 U.S. at 492. That circularity already renders "working" a tenuous category of major life activity. When

courts dilute the concept of "working" even further, as the court of appeals did in this case by deeming exclusion from a single job to be a disability, the result is entirely contrary to the text of and the policy behind the ADA and its regulations.

As this Court observed in *Murphy*, "to be regarded as substantially limited in the major life activity of working, one must be regarded as precluded from more than apa rticular job." 527 U.S. at 523. In *Gelbart-Ladenheim v. American Airlines, Inc.*, 252 F.3d 54 (1st Cir. 2001), for example, the court affirmed summary judgment in favor of the employer where the plaintiff, an airline gate agent with limitations on lifting, sitting, standing, and typing, presented no evidence that her limitations precluded her from a class or broad range of jobs. *Id.* at 58-62. Similarly, in *Muller v. Costello*, 187 F.3d 298 (2d Cir. 1999), the court rejected the jury's finding of disability discrimination in a case brought by a correctional officer who required asmoke -free work environment, noting various other jobs the plaintiff could have held, including correctional officer in a smoke-free jail. *Id.* at 312-13. [2] And in *Tice v. Centre Area Transportation Authority*, 247 F.3d 506 (3d Cir. 2001), the court affirmed summary judgment in favor of the employer where the plaintiff, a bus driver with back injuries, could not "identify any limitations caused by his injuries besides the limitation on bus driving, and would have the jury speculate as to whether there might possibly be jobs out there that he cannot perform." *Id.* at 513.

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[2] The court affirmed the judgment on the ground that the verdict was supported by a separate claim of retaliation unrelated to the plaintiff's disability status under the ADA. *Muller*, 187 F.3d at 314-15.

Indeed, *every* other court of appeals has reached the same conclusion – contrary to the Sixth Circuit's view – and has rejected claims of disability where an employee claiming disability under the ADA does not demonstrate inability to perform a class or broad range of jobs. *See also Hooven-Lewis v. Caldera*, 249 F.3d 259, 266-70 (4th Cir. 2001) (affirming summary judgment for employer under Rehabilitation Act, which incorporates ADA standards, where plaintiff lab technician with "hand tremor" was precluded only from performing bench work as a retrovirologist, not a class or broad range of jobs); *Hamilton v. Southwestern Bell Tel. Co.*, 136 F.3d 1047, 1050-52 (5th Cir. 1998) (affirming summary judgment for employer where employee offered no evidence that post-traumatic stress disorder excluded him from class or broad range of jobs); *Contreras v. Suncast Corp.*, 237 F.3d 756, 761-64 (7th Cir. 2001) (affirming summary judgment for employer where forklift operator with restrictions on lifting, strenuous work, or driving forklift more than four hours per day failed to show exclusion from class or broad range of jobs, even assuming he could no longer operate a forklift), *cert. denied*, 70 U.S.L.W. 3234 (U.S. Oct. 1, 2001); *Brunko v. Mercy Hosp.*, 260 F.3d 939, 941-42 (8th Cir. 2001) (affirming summary judgment for employer where trauma center nurse with restriction on lifting was not excluded from class or broad range of jobs); *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 794-96 (9th Cir. 2001) (affirming summary judgment for employer where newspaper reporter with restriction on keyboard typing "failed to present evidence of the jobs from which she was precluded and of the relevant labor markets for that class of jobs"); *Selenke v. Medical Imaging of Colorado*, 248 F.3d 1249, 1256-57 (10th Cir.

2001) (affirming summary judgment for employer where radiology technician and mammographer with sinusitis precluding exposure to various fumes failed to show exclusion from class or broad range of jobs); *Hilburn v. Murata Elecs. N. Am., Inc.*, 181 F.3d 1220, 1226-28 (11th Cir. 1999) (affirming summary judgment for employer where material control operator with coronary heart disease and restriction on lifting failed to show exclusion from class of jobs); *Duncan v. Washington Metro. Area Transit Auth.*, 240 F.3d 1110, 1113-16 (D.C. Cir. 2001) (en banc) (reversing jury verdict for plaintiff, a custodian with back injuries and restrictions on lifting, where no evidence of exclusion from class or broad range of jobs), *cert. denied*, 70 U.S.L.W. 3234 (U.S. Oct. 1, 2001).

II. This Court Has Already Granted Certiorari To Address The Important Question Presented

In one significant recent case, the Sixth Circuit addressed an employee's claim that her employer failed to accommodate her inability to perform manual tasks that "require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time." *Williams v. Toyota Motor Mfg., Kentucky, Inc.*, 224 F.3d 840, 843 (6th Cir. 2000). The court there concluded that the plaintiff's inability to carry out certain manual tasks related to her job was sufficient to give rise to coverage under the ADA. *Id.* at 844. In a vigorous dissent, Judge Boggs criticized the majority for allowing the claim to proceed: "Williams has not shown a substantial limitation in working, because the inability to perform a single, particular job is not a substantial limitation, and she has not demonstrated that there is ab roader

class of jobs from which her impairment disqualifies her." *Id.* at 847 (Boggs, J., concurring in part and dissenting in part). "Nor," Judge Boggs continued, "has Williams shown a substantial limitation in performing manual tasks, because her limitation is mostly confined to a subset of job-specific tasks." *Id.*

In April of this year, this Court granted certiorari in that case to address "[w]hether the Sixth Circuit correctly held – in conflict with the established rule in other circuits – that an impairment precluding an individual from performing only a limited number of tasks associated with a specific job qualifies as a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*" *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, No. 00-1089, Pet. for Cert. at i. The Solicitor General's *amicus curiae* brief on behalf of the United States frames the question presented in *Toyota* slightly differently:

> Whether an impairment that limits an individual's ability to perform particular job-related manual tasks can constitute a "disability" under the Americans with Disabilities Act of 1990, 42 U.S.C. 12102(2)(A), even if there has been no finding that the plaintiff has been excluded from a class of jobs or a sufficiently broad range of jobs to establish a substantial limitation on the "major life activity" of "working," and no finding that the plaintiff's impairment substantially limits her ability to perform manual tasks outside of work.

Toyota, Br. for the United States as Amicus Curiae Supporting Petitioner at I.

In its merits brief to this Court, Toyota argues that "[t]he Sixth Circuit's approach effectively makes an end-run around the restrictions both this Court and the EEOC have recognized for establishing a disability based on the major life activity of working." *Toyota*, Pet. Br. at 19. "This Court has held that '[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work *in a broad class of jobs*.'" *Id.* (quoting *Sutton*, 527U .S. at 491 (emphasis by Toyota)). "The Sixth Circuit's decision . . . eviscerates these well-established doctrinal and regulatory principles, and in the process legitimates an entire species of disability claims that have heretofore been universally rejected: those based on an inability to perform a single job." *Id.* at 20. As Toyota notes, under the Sixth Circuit's peculiar approach "thousands of individuals whose impairments only preclude them from working one particular job or one type of job can now evade the limits on the major life activity of working that this Court established in *Sutton*," and "it would no longer be fatal to their disability claims that they were precluded from only one particular job." *Id.* at 20-21.

Thus, *Toyota* presents precisely the same question that is at issue in this case and does so in a closely parallel legal and factual setting. Indeed, this case and *Toyota* were both decided by the same court of appeals, suggesting that that court's view of the disability analysis is seriously out of step with the ADA, the EEOC's interpretive regulations, and the decisions of this Court and numerous courts of appeals. Given that both cases present the same question, it is readily apparent that a favorable decision in

Toyota would have a direct and substantial impact on the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be held pending resolution of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, No. 00-1089, and then disposed of in light of that case. Alternatively, the Court may wish to grant certiorari in this case to give plenary review to the question presented in this petition.

Respectfully submitted,.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-4367

May 7, 2001, Filed

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati.

No. 97-01142

Sandra S. Beckwith, District Judge

JUDGES:
Before: NORRIS and DAUGHTREY, Circuit Judges; BERTELSMAN, District Judge.*

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

PER CURIAM. In this appeal, the Equal Employment Opportunity Commission seeks reversal of the district court's decision granting summary judgment to the defendant, United Parcel Service, in an action brought by the EEOC under the Americans with Disabilities Act, 42 U.S.C. § 12117(a), on behalf of former UPS employee William Woods. Because we find disputed questions of material fact concerning the company's failure reasonably to accommodate Woods's disability by permitting him to transfer to another UPS facility, we conclude that summary judgment was inappropriate and reverse.

PROCEDURAL AND FACTUAL BACKGROUND

Summarized, the complaint in this suit indicated that Woods was originally a UPS driver at the company's facility in Austin, Texas, when he developed a serious reaction to a local allergen and was advised by his physician to leave central Texas. Woods requested a transfer from the company, but UPS refused the transfer, citing company policy and, according to Woods, suggested instead that he resign his position in Texas and re-apply for a job with UPS in Ohio, thereby achieving the same result. Allegedly acting on this advice, Woods quit his job, moved his family to northern Kentucky, and applied for a job with UPS in Cincinnati. Upon receipt of his application, however, UPS informed Woods that he would not be rehired due to a company policy of not hiring former employees.

Woods filed a complaint with the Equal Employment Opportunity Commission, which filed this lawsuit on his behalf, alleging that UPS failed to provide a reasonable accommodation of

Woods's disability by refusing to allow his relocation to a different geographical region. UPS moved for summary judgment, arguing first that Woods could not make out a prima facie case of discrimination because he was not disabled, that his EEOC charge was not timely filed with respect to the failure to transfer claim, and that Woods lost coverage under the ADA when he voluntarily resigned his job in Texas. UPS also argued that even if Woods was actually disabled and covered by the ADA, UPS had no obligation to accommodate him because he was able to perform the essential functions of his job without accommodation, because UPS did not know or have reason to know of his disability, and because relocating Woods to Cincinnati was unreasonably burdensome.

The district court granted UPS's motion. The court began by dividing the EEOC's complaint into two distinct violations, i.e., the failure to transfer and the failure to rehire. The court characterized the first violation (the failure to transfer) as a reasonable accommodation claim, and the second (the failure to rehire) as a discrimination claim. Because Woods did not file his EEOC complaint until April 1995 – approximately one year after UPS informed him that he would not be transferred due to company policy -- the court ruled that his charge was untimely under the ADA, which incorporates Title VII's 300-day filing requirement. Therefore, the court granted summary judgment to UPS on the transfer issue.

Regarding the purported "second" claim of discriminatory failure to rehire, the court found that Woods could not establish that he was disabled or that UPS regarded him as disabled after he was in the Cincinnati area, because his allergies had cleared up at that point. The court fur-

ther held that UPS employees in Cincinnati did not know of Woods's disability in Texas, and so the EEOC could not establish that their failure to rehire Woods was based on any discriminatory motive. Finally, the court noted in a footnote that even if the EEOC intended the failure to rehire claim to be construed as a denial of a reasonable accommodation, the claim would fail because once Woods had voluntarily resigned his position in Texas, he was no longer entitled to the protection of the ADA.

On appeal, the EEOC contends that the district court wholly mischaracterized its case by separating the complaint into two distinct claims. The Commission argues that the failure to transfer and the failure to rehire were all part of a single extended negotiation that resulted in UPS's failure reasonably to accommodate Woods's disability with relocation, and that insofar as the terms of that negotiation are contested, the matter should be presented to a fact-finder for trial. UPS, of course, denies that there are any disputed issues of material fact and supports the district court's construction of two distinct claims, arguing that both are barred as a matter of law. We disagree on both counts.

The record at the time of the summary judgment motion showed that Woods had been a driver in the company's Austin district since January 1984. Without question, he was a "qualified individual" for ADA purposes: his record at UPS was unblemished and he later received positive letters of reccommendation from his supervisor in Texas. In 1988, Woods began developing serious allergic reactions that grew progressively worse over time. By 1994, these reactions were quite severe and constant, including fever, swollen eyes, nasal congestion, fever blisters, rashes, lung congestion, fatigue, and

depression, making it difficult for him to breathe, eat, and sleep. According to his doctors, Woods was allergic to the pollen of a plant, Mountain Cedar, which is specific to central Texas and unique in causing allergic rhinitis. Because the pollen is found only in a particular area of the country, Woods's doctors advised him that relocation might be the only solution when other treatments failed.

In March 1994, Woods wrote a letter to William Smith, the central Texas district manager for UPS, informing Smith that he suffered from severe allergies specific to central Texas and that he wanted to transfer out of the region in order to alleviate his symptoms. Specifically, Woods sought a transfer to the Kentucky area where he had lived previously and had not suffered from allergies. His request was accompanied by letters from Woods's doctors urging UPS to consider seriously the request for a transfer. One physician pointed out that the numerous medications prescribed for Woods's condition "ha[d] been ineffective" but that alternatives were unavailable because they would cause sedation, an unsafe condition for a professional driver. In April 1994, Rick Montecinos, the human resources manager for UPS, informed Woods that although a transfer was not possible under company policy, Woods could nevertheless resign his position in Texas and be rehired in Ohio or Kentucky.

Montecinos arranged for Woods and his wife to meet with Alexa Johnson, the UPS human resources manager in Cincinnati, in order to discuss the possibility of obtaining a position there. Johnson similarly advised Woods that he could not be transferred to Ohio, but that, as an alternative, he could quit his job in Texas and apply as an ew hire in Ohio, sacrificing any accumulated seniority under the collective bargaining

agreement. Johnson refused to accept an application from Woods while he was still employed by UPS in Texas, but told him if he applied to her before the busy Christmas season, there would be the possibility of at least a seasonal job for him.

On the basis of these conversations, Woods resigned his position with UPS in Texas and moved his family to Kentucky in October 1994. He submitted an application to UPS in Cincinnati, along with favorable letters of recommendation from Montecinos and Joel Davis, Woods's center manager in Texas. In November or December 1994, however, Woods was told that he would not be hired, due to the policy of UPS not to rehire former employees.

UPS, for its part, denies that any of its employees ever promised Woods that he could have a job in Cincinnati and argues that UPS would have been happy to have Woods stay on as an employee in Texas if he so desired. UPS also suggests that the real reason Woods wanted to transfer to Kentucky was that his family resided there, and that his allegations about disabling allergies were a useful mechanism for getting Woods closer to his family despite the no-transfer policy. UPS alleges that Woods by his own admission was never so disabled by his allergies that he could not do his job, and emphasizes that Woods decided to resign his position voluntarily after his request for a transfer was denied.

DISCUSSION

1. Standard of Review

We review a grant of summary judgment de novo. *See, e.g., Hammon v. DHL Airways, Inc.*, 165 F.3d 441, 447 (6th Cir. 1999). In doing so, we must view the evidence and all inferences to be

drawn therefrom in a light most favorable to the non-movant. *See, e.g., Keever v. City of Middletown*, 145 F.3d 809, 811 (6th Cir.), *cert. denied*, 525 U.S. 963, 142 L. Ed. 2d 330, 119 S. Ct. 407 (1998). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

2. Timeliness

The United States Supreme Court has held that the limitations period does not begin to run on a claim for employment discrimination until an employer makes and communicates af inal decision to the employee. *See Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). Once the employee is aware or reasonably should be aware of the employer's decision, the limitations period commences. *Id*; *see also Dixon v. Anderson*, 928 F.2d 212, 218 (6th Cir. 1991).

In this case, assuming that the EEOC's version of the facts is true, Woods went to his supervisors at UPS in March 1994 and explained that due to his deteriorating state of health and on the advice of his physician, he needed to leave central Texas. Woods requested a transfer both orally and in writing. After some weeks of negotiation, UPS denied his request, but offered another option. According to Woods and his wife, several supervisory employees of UPS advised Woods that as an alternative to transfer he could resign his job in Texas and re-apply for a job in Ohio, with assurances that there would be an opening for him in Ohio as long as he arrived before the busy holiday season. Given these facts, we are persuaded that Woods was involved in an

ongoing interactive process with UPS in order to find some reasonable accommodation for his disability,[1] and that it was not until after Woods was denied rehire in Ohio that he was aware of any adverse employment action of which he could complain. Contrary to the district court's characterization, there were not two separate adverse actions, but rather an ongoing process that ended when Woods found himself without a job in November 1994. Because Woods filed his EEOC complaint within 300 days of learning he would not be employed with UPS, and because he arguably had no reason to suspect that his disability would not be accommodated until that time, his charge was timely filed with respect to his claim that UPS failed to reasonably accommodate his disability. The district court erred in characterizing the complaint as two distinct claims, and because the court's ruling on timeliness was based on this bifurcation of the claim, we find that the EEOC complaint as a whole was timely.

3. The EEOC's Prima Facie Case

To establish a prima facie case of employment discrimination under the ADA, a plaintiff must show (1) that s/he is disabled; (2) that s/he is otherwise qualified for the position with or without reasonable accommodation; and (3) that s/he suffered an adverse employment action because of his or her disability. *See, e.g., Gilday v.*

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[1] Engaging in such a process is encouraged by the regulations, which provide: "To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3).

Mecosta County, 124 F.3d 760, 762 (6th Cir. 1997). A person is "disabled" under the Act if his or her physical or mental impairment substantially limits one or more life activities, including breathing and self-care. 29 C.F.R. § 1630.2(g)-(j). "Reasonable accommodation" can include "[m]odifications or adjustments to the work environment...that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o).

The EEOC insists that Woods was disabled while in Texas because his allergies were so severe as to impair his ability to breathe and to care for himself. There is testimony in the record which indicates that Woods's reactions to the allergen were steadily worsening, and that by the time he requested the transfer he rarely left home and spent nearly all of his non-working hours in bed. His wife assumed responsibility for his correspondence and household duties, while he suffered with severe nasal and bronchial congestion, swollen eyes and nose, rashes and fever blisters over large areas of his body, fatigue, fever, and depression. UPS counters that Woods cannot be viewed as disabled because he was able to work his regular hours without accommodation while in Texas, and because he was admittedly no longer disabled once he moved to northern Kentucky. However, on the basis of the evidence noted above, Woods's letter to Smith noting his severe allergies specific to Central Texas and requesting a transfer, and his physician's letter stating that effective allergy medication would threaten Woods's safe operation of his truck, we conclude that a reasonable jury could find that Woods was properly "disabled" under the statute due to the substantial limitations his allergy placed on his ability to perform his job

while in Texas, the place where he sought the accommodation of a relocation.

There being no dispute about the employee's status as a" qualified individual," given his record with UPS in Texas, the EEOC's final hurdle in demonstrating aprima facie case is to establish that Woods suffered an adverse employment action due to his disability. This is perhaps the area of greatest dispute between the parties. UPS focuses on Woods's voluntary resignation in arguing that no adverse action occurred, while the EEOC emphasizes the company's alleged role in inducing that resignation to argue that UPS failed to accommodate Woods. The district court, agreeing with UPS, found that Woods could not have suffered an adverse employment action and was not under the protection of the ADA once he voluntarily resigned his position in Texas, citing this court's unpublished per curiam decision in *Lambert v. Aetna Life Ins. Co.*, 178 F.3d 1295, 1999 WL 232697 (6th Cir. 1999). While that decision is not binding, we note that it is distinguishable on its facts from the case now before us.

In *Lambert*, the panel held that the plaintiff, who had voluntarily resigned her position after being refused a transfer, was not entitled to the protections of the ADA. However, in that case there was substantial evidence that Lambert was not otherwise qualified for the job for which she re-applied. More to the point, we noted in a published opinion that "an employee's voluntary resignation is not truly voluntary when his employer has encouraged him to resign in order to prevent him from claiming an employee benefit." *Hammon*, 165 F.3d at 447. Similarly, an employee's resignation is not truly voluntary when, as here, it has been encouraged by his employer as a purportedly necessary step in accommodat-

ing his disability. We have recently joined the Seventh Circuit in holding that "an employer has a duty under the ADA to consider transferring a disabled employee who can no longer perform his old job even with accommodation to a new position within the Company for which that employee is otherwise qualified." *Burns v. Coca-Cola Enterprises*, 222 F.3d 247, 257 (6th Cir. 2000) Therefore, considering UPS's statutory duty to consider transfer as a reasonable accommodation for Woods, and taking Woods's allegations about UPS's promises of rehire as true, we conclude that areasonable jury could find that Woods's resignation was not truly voluntary and not actually intended to end his employment with UPS. In that limited context, UPS's subsequent failure to rehire Woods can legitimately be seen as an adverse employment action, because it resulted in the involuntary loss of his job due to UPS's failure to reasonably accommodate his disability.

4. Disputed Issues of Material Fact

From our discussion of the district court's rulings on the EEOC's prima facie case, it is clear that there remain in this case questions of disputed fact that are material to the outcome of the case and will therefore have to be submitted to the trier of fact for resolution. Regarding motions for summary judgment, the Supreme Court has noted that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis in original). The Court continued by emphasizing the dual requirements of genuineness -- that is, that a dispute must concern evi-

dence upon which the jury could return a verdict for the non-moving party -- and materiality: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

In this case, UPS asserts that the facts are uncontested, although it acknowledges that "the Commission has claimed the existence of a few genuine issues of material fact, surrounding its argument that an 'interactive process' occurred in response to a request for ADA accommodation...and its argument that Woods was misled by UPS's promises of employment into resigning his job." UPS claims, without explanation, that these disputed facts are not material as a matter of law.

This claim is simply disingenuous. If the EEOC's version of the facts is to be believed, then UPS advised Woods to resign his Texas position and re-apply in Cincinnati as an alternative to transfer, and as an accommodation for a disability of which they were well aware. Assuming these facts are true, the EEOC can arguably make out a prima facie case of failure to accommodate, when the company's treatment of Woods is viewed as an integrated whole and not bifurcated into separate claims, as the district court mistakenly believed it should be. We conclude that the facts in this regard are genuinely disputed and clearly material to the case at hand. It follows that the district court's grant of summary judgment must be reversed on this ground and the case remanded for further proceedings.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

No. C-1-97-1142

September 16, 1999, Filed

Equal Employment Opportunity Commission,
Plaintiff,

vs.

United Parcel Service, Inc.,
Defendant.

Memorandum and Order

Plaintiff initiated this action in December 1997 by filing a complaint pursuant to which it asserted a claim that Defendant had violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101, et seq., in the context of its relationship with former employee William E. Woods. Pursuant to a second amended complaint, filed on this date, Plaintiff alleges that Defendant violated the ADA by failing to make reasonable accommodation for Mr. Woods' disability, sensitivity to an allergen unique to the area of Texas where he was employed, and by subjecting Mr. Woods to different terms, conditions, and privileges of employment than those enjoyed by other employees or potential employ-

ees. This matter is now before the Court upon Defendant's motion for summary judgment.

1. Background

Defendant hired William Woods in its Central Texas District in 1984. From 1988 until he resigned his employment, Mr. Woods worked as a package car driver in that district. Plaintiff alleges that in March 1994 Mr. Woods informed Defendant's Central Texas District Manager that he suffered from the physical impairment of an allergy specific to the Texas geographical area. Mr. Woods asked for a transfer to one of Defendant's other districts in the Southern Ohio or Northern Kentucky areas. Both Mr. Woods and his wife were raised in the Northern Kentucky area. Plaintiff concedes that Mr. Woods could perform the essential functions of his job at all relevant times but alleges that his allergy substantially limited various major life activities. In March or April 1994, Defendant advised Mr. Woods that it would not transfer him to any other district inasmuch as its corporate policy prohibited such transfers. Plaintiff concedes that Mr. Woods did not file a timely charge with Plaintiff related to that denial of a transfer.

Mr. Woods pursued a different solution to his problem. After consulting with various officials in Defendant's management, Mr. Woods decided to resign his employment, move to Northern Kentucky, and apply for rehire by Defendant in Northern Kentucky or Southern Ohio. Plaintiff alleges that various of Defendant's officials, both in Texas and in Southern Ohio, assured him that he would be eligible for rehire. He resigned his employment in August 1994, but by December of 1994 he had learned that Defendant would not rehire him.

Mr. Woods then filed a discrimination charge against Defendant with Plaintiff. He alleged that Defendant had applied its policy against rehiring former employees to him, while it had rehired other former employees pursuant to an exception to the policy for "special circumstances." Because his allegedly disabling allergy was unique to Texas, Mr. Woods does not contend that the allergy substantially limited any major life activity once he had moved away from Texas. Nevertheless, he contends that Defendant's refusal to rehire him violated the ADA.

Defendant moves for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on various grounds. First, Defendant contends that Mr. Woods' failure to file a timely charge with respect to its refusal to transfer him to Southern Ohio or Northern Kentucky bars the assertion of an ADA claim on the basis of that action. It further contends that Plaintiff cannot establish that he was entitled to a reasonable accommodation for his alleged disability, inasmuch as he was able to perform the essential functions of his position without such an accommodation. Finally, Defendant contends that Mr. Woods was not disabled in Texas and that he is not disabled in Northern Kentucky, and that, accordingly, he is not entitled to the protection of the ADA against disparate treatment.

Plaintiff opposes Defendant's motion for summary judgment and also has moved to strike that motion. Plaintiff's motion to strike is based upon Defendant's reliance, in support of its motion, upon the transcripts of various depositions that were not a part of the record in this matter when Defendant filed its motion for summary judgment.

Defendant, recognizing that it had failed to timely make the transcripts a part of the record,

filed them shortly after it filed its motion for summary judgment. Defendant represents that Plaintiff was not prejudiced by Defendant's failure to timely file the deposition transcripts and asks the Court to excuse its failure.

2. The Motion to Strike

Plaintiff correctly notes that Southern District of Ohio Local Rule 7.2(e) requires that deposition transcripts upon which a party relies in support of a motion for summary judgment be filed no later than the filing of the dispositive motion. Defendant failed to comply with that rule. The Court is not persuaded, however, that Plaintiff was prejudiced by Defendant's failure to comply with the rule. Defendant acted quickly to remedy the situation, and the transcripts were available to Plaintiff at all relevant times. Plaintiff's motion to strike Defendant's motion for summary judgment (Doc. 27) is, therefore, DENIED.

3. The Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. United States v. Diebold, Inc., 369 U.S. 654 (1962). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of

material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (emphasis in original).

The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id.

The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472 (1962). "[T]he issue of material fact required by Rule 56(c). . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service Co., 391 U.S. 253, 288-89 (1968).

Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, Smith v. Hudson, 600 F.2d 60, 63 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979), the United States Supreme Court has stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). Ac-

cording to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id. at 323; Anderson, 477 U.S. at 250.

Accordingly, summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Significantly, the Supreme Court also instructs that the "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence. Id.; Anderson, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id.

Further, there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. Id. Rule 56(a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

4. Analysis

Plaintiff addresses two actions or series of actions by Defendant that, in Plaintiff's estimation, violated the ADA. First, Plaintiff complains that Defendant refused William Woods the reasonable accommodation required by the ADA when it denied his request to be transferred to Southern Ohio or Northern Kentucky. Second, Plaintiff alleges that Defendant subjected Mr. Woods to different terms, conditions, and privileges of employment than those enjoyed by other employees or potential employees when it refused to rehire him in Southern Ohio or Northern Kentucky.

Plaintiff concedes that Defendant had informed Mr. Woods of its final decision against transferring him out of the Central Texas District in March or April 1994. By that time, Mr. Woods was aware that his request for that accommodation was denied, and the time within which he was required to file adiscr imination charge based upon that refusal began to run. See Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). Plaintiff concedes that Mr. Woods did not file a discrimination charge with Plaintiff related to the denial of that request within the 300-day period prescribed by statute. That failure is fatal to Plaintiff's claim, to the extent that it is based upon the denial of Mr. Woods' request for the accommodation of a transfer. See 42 U.S.C. §2000e-5(e) (1).[1]

Plaintiff contends that the 300-day filing requirement does not bar its claim based upon Defendant's denial of Mr. Woods' request for a transfer because the parties engaged in an inter-

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[1] The ADA incorporates Title VII's 300-day filing requirement by reference.

active process that continued into the 300-day period preceding the date upon which Mr. Woods filed his discrimination charge with Plaintiff. Defendant denies that any interactive process took place. In any event, the evidence of record unequivocally establishes that any interactive process was not related to Mr. Woods' request for a transfer but to his subsequent plan to resign his employment in Texas in order to be rehired in Southern Ohio or Northern Kentucky. Accordingly, Plaintiff's claim based upon Defendant's denial of Mr. Woods' request for a transfer is not saved by the ongoing nature of any interactive process.

Plaintiff's second claim is that Defendant discriminated against William Woods in the terms, conditions, and privileges of his employment, in violation of the ADA, when it refused to rehire him in Southern Ohio or Northern Kentucky after he had voluntarily resigned his employment in Texas. Plaintiff alleges that Defendant's employees in Texas had assured Mr. Woods that he would be eligible for rehire, in spite of Defendant's policy against rehiring former employees, under the exception to the policy for "special circumstances." Plaintiff further alleges that Alexa Johnson, an official of Defendant in Northern Kentucky or Southern Ohio, assured Mr. Woods that Defendant would look favorably upon his application for rehire under the "special circumstances" exception. After Mr. Woods voluntarily resigned from his employment in Texas, however, in August 1994, Defendant's officials in Northern Kentucky/Southern Ohio refused to rehire Plaintiff, citing the "no rehire" policy. Plaintiff alleges that Defendant did not uniformly apply that policy to former employees, however, and on that basis asserts its claim for disparate treatment.

In order to prove a claim of discrimination in the terms, conditions, and privileges of employment, a plaintiff under the ADA must establish that he is a member of the class of persons entitled to the protection of the ADA. See, e.g., Mitchell v. Toledo Hospital, 964 F.2d 577, 582 (6th Cir. 1992). In other words, Plaintiff must prove that Mr. Woods was an individual with a disability as that term is defined by the ADA.

> The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. §12102(2). Plaintiff concedes that Mr. Woods did not suffer from a disability after he moved to Northern Kentucky in 1994. The disability from which he allegedly suffered in Texas was an allergy to a substance that was unique to the Central Texas area.[2] Plaintiff concedes that, while Mr. Woods may have suffered from allergies in Northern Kentucky, they did not constitute a disability. The record is also devoid of evi-

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[2] The Court refers to the allergen as a "substance" because Plaintiff and Mr. Woods have not been consistent in describing the allergen. Plaintiff alleges that Mr. Woods is allergic to the pollen of a plant that is indigenous to the area of Texas where he resided. Mr. Woods apparently told Defendant that he is allergic to a dust mite.

dence that could establish that Defendant regarded Mr. Woods as a person with a disability after he moved to Northern Kentucky. Accordingly, Plaintiff may establish its ADA disparate treatment claim only on the basis of Mr. Woods' record of a disability.

Plaintiff identifies Ron Welborn as Defendant's employee in Southern Ohio/Northern Kentucky who decided that Defendant would not rehire Mr. Woods. Plaintiff further concedes that Mr. Welborn did not "inquir[e] into the specific circumstances regarding Mr. Woods, his physical condition, or the reasons for his move from Texas to Kentucky." See Memorandum in opposition to Defendant's motion for summary judgment, p.17. Rather, Plaintiff acknowledges that Mr. Welborn simply applied Defendant's policy against rehiring former employees to Mr. Woods. See Welborn deposition, p.29.

If Mr. Welborn applied that policy differently to Mr. Woods than to other former employees, as Plaintiff alleges, Plaintiff is, nevertheless, precluded from establishing a claim under the ADA unless it can demonstrate that Mr. Welborn based his decision upon Mr. Woods' record as an individual with a disability. Plaintiff can only establish that Mr. Woods was entitled to the protection of the ADA at the time of Mr. Welborn's decision by proving that Mr. Welborn knew of Mr. Woods' record of a disability and was motivated by that record.

Plaintiff's acknowledgement that Mr. Welborn was unaware of the specific circumstances surrounding Mr. Woods' application for rehire is fatal to its disparate treatment claim. On the basis of the evidence in the record, Plaintiff cannot prove that Defendant's decision-maker, Mr. Welborn, knew of Mr. Woods' claim that he had been disabled by virtue of the allergy he suffered in

Texas. See Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928, 934 (7th Cir. 1995). Because the ADA protects a disabled individual only from adverse employment actions that are motivated by the individual's disability, Mr. Welborn's lack of knowledge of Mr. Woods' record of an alleged disability precludes recovery for the decision by Mr. Welborn not to rehire Plaintiff. Defendant's arbitrariness in application of the "special circumstances" exception to the policy against rehiring former employees is not illegal unless it is based upon a discriminatory motive. Because Plaintiff cannot prove such a motive in Mr. Woods' case, it cannot prove its disparate treatment claim in this action.[3]

5. Conclusion

For those reasons, Defendant's motion for summary judgment (Doc. 23) is hereby GRANTED. This action is CLOSED.

IT IS SO ORDERED.

/S/
Sandra S. Beckwith
United States District
Judge

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[3] To the extent that Plaintiff intended for the claim based upon Defendant's failure to rehire Mr. Woods to be a claim for denial of a reasonable accommodation, Mr. Woods' voluntary resignation deprived him of the protection of that portion of the ADA that requires an employer to make reasonable accommodations for a disabled employee. Accordingly, the claim also fails on that basis. See Lambert v. Aetna Life Ins. Co., No. 98-3498, 1999 WL 232697 at ** 4 (6th Cir. April 12, 1999).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-4367

July 31, 2001, Filed

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

UNITED PARCEL SERVICE, INC.,
Defendant-Appellee.

NOTICE:
DECISION WITHOUT PUBLISHED OPINION

JUDGES:
BEFORE: NORRIS and DAUGHTREY, Circuit Judges; and BERTELSMAN,* District Judge

* Hon. William O. Bertelsman, Chief United States District Judge for the Eastern District of Kentucky, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/
Leonard Green, Clerk